Supreme Court, U.S.
FILED
09-382 SEP 25 2009
OFFICE OF THE CLERK

141

(1)

No.

IN THE SUPREME COURT OF THE UNITED STATES

FORMER CORONEL CARMELO CORREA RUIZ, ET ALS., INCLUDING THE PERSONS THAT APPEAR IN ADDENDUM -A-
PETITIONERS

V.

HONORABLE LUIS FORTUÑO IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO; HONORABLE SILA M. CALDERON-SERRA, IN HER PERSONAL CAPACITY; VICTOR M. RIVERA-GONZALEZ, FORMER SUPERINTENDENT OF THE POLICE CORPS DEPARTMENT OF PUERTO RICO, IN HIS PERSONAL CAPACITY; THE POLICE DEPARTMENT OF THE COMMONWEALTH OF PUERTO RICO AND THE COMMONWEALTH OF PUERTO RICO AND JOSE FIGUEROA SANCHA, PRESENT SUPERINTENDENT OF THE POLICE DEPARTMENT OF PUERTO RICO, IN HIS OFFICIAL CAPACITY
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CICUIT

PETITION FOR WRIT OF CERTIORARI

JESUS HERNANDEZ SANCHEZ
First Bank Bldg., Suite 806
1519 Ponce de Leon Ave.
San Juan, Puerto Rico 00909-1791
Tel. (787) 722-5814/5813
Fax (787) 725-1112
Counsel of Record

QUESTION PRESENTED FOR REVIEW

1. Whether the exemption contained in §623 (j)(1) of the 1996 ADEA amendments requiring compliance with §3(d)(2) that requires the issuance of guidelines and regulations by the Secretary of Health and Human Services for the administration of physical and mental tests is a condition precedent to involuntary retirement for police officers and firefighters.

2. Whether Puerto Rico Law 181, PR Laws Ann. Title 3 § 7669 (2003) lowering the mandatory retirement age for police officers and firefighters from 65 to 55 was a subterfuge in violation of 29 U.S.C 623 j (2) of ADEA which prohibits subterfuges from the employer.

3. Whether discharging the police officers in our case without offering them the opportunity of passing an annual physical and mental test is tantamount to depriving them of the due process of the law.

4. Whether plaintiffs alleged sufficient facts to establish a viable claim under the pleadings standard in the case of Akos Swierkiewicz v. Sorema, 534 U.S. 506 (2002).

TABLE OF CONTENTS

	Pages
Questions presented for review....	i
Table of Authorities.....	iii
Opinion Below.....	2
Jurisdiction.....	2
Statutory Provision Involved.....	2-6
Statement.....	6-9
Reasons for Granting the Petition....	9-28
Conclusion.....	28-29
Appendix	
A. Decision of Circuit Court of July 7, 2009...	1a-46a
B. Judgment of July 7, 2009.....	47a-48a
C. Eight Amended Complaint.....	49a-69a
D. Act No. 181 of 2003.....	70a-75a
E. Act No. 22 of 2005.....	76a-81a
F. Addendum A: List of Parties.....	82a-84a

TABLE OF AUTHORITIES

PAGES

CASES:

Ex parte Young, 209 U.S. 123 (1908)..... 7

Drnek v. City of Chicago, 192 F. Supp. 2d 835 (2002)..... 11,12,14,16

Glennon v. Village of Barrington, 2000 U.S. 13086..... 11

Minch v. City of Chicago, 363 F 3d 615 (2004)..... 11

James D. Minch, et al., v. City of Chicago 543 U.S. 879 (2004)..... 11

Kopec v. City of Elmhurst, 193 F 3d 894 7th Cir. (1999)..... 19

EEOC v. Wyoming, 460 U.S. 226 (1983)..... 20

Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985)..... 21

State Police for Automatic Retirement Association v. Difava, 317 F. 3d 6 (1st Cir. 2003)..... 21

Gately v. Commonwealth of Mass, 2 F. 3d 1221 (1st Cir. 1993)..... 21

Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978)..... 23

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 23

Swierkiewicz v. Sorema, 534 U.S. 506 (2002)... 23, 24

Bell Atlantic Corp., et al., v. William Twombly
550 U.S. 2007..... 24

STATUTES, RULES AND REGULATIONS

Section 1, article XIV U.S. Constitution..... 5

14th Amendment of the U.S. Constitution..... 5

29 U.S.C. § 623 (j)..... 2

29 U.S.C. § 623 (3)..... 4

28 U.S.C. 1254 (1) 2

29 U.S.C. § 623 (j) 2

29 U.S.C. § 623 (3)..... 4

42 U.S.C. § 1983 5,6

28 U.S.C. 1367 7

29 U.S.C. 623 (j) (1) 12,16,17

29 U.S.C. 623 (3) (d) (2) 12,13,17

29 U.S.C. § 621 et seq. 25

RULES

Rule 10 (c), Supreme Court Rules..... 10

Rule 8 (a) F.R.C.P. 25

Rule 12, F.R.C.P. 24

PUERTO RICO STATUTES

Act of P.R. No. 181 of 2003 (3 PRLA 766 g)..... 6

Art. No. 1802 Puerto Rico Civil Code, 31 P.R.C.A. 5141..... 7

Act of P.R. No. 22 of 2005..... 27

U.S. LAWS

PL 104-208, Sept. 30,1996 110 Stat 3009..... 21

The Omnibus Consolidated Appropriation Act, 104th Congress 2nd session, Section 119..... 21

No.

IN THE SUPREME COURT OF THE UNITED STATES

FORMER CORONEL CARMELO CORREA RUIZ, ET ALS., INCLUDING THE PERSONS THAT APPEAR IN ADDENDUM -A-

PETITIONERS

V.

HONORABLE LUIS FORTUÑO IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO; HONORABLE SILA M. CALDERON-SERRA, IN HER PERSONAL CAPACITY; VICTOR M. RIVERA-GONZALEZ, FORMER SUPERINTENDENT OF THE POLICE CORPS DEPARTMENT OF PUERTO RICO, IN HIS PERSONAL CAPACITY; THE POLICE DEPARTMENT OF THE COMMONWEALTH OF PUERTO RICO AND THE COMMONWEALTH OF PUERTO RICO AND JOSE FIGUEROA SANCHA, PRESENT SUPERINTENDENT OF THE POLICE DEPARTMENT OF PUERTO RICO, IN HIS OFFICIAL CAPACITY

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CICUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The judgment of the Court of Appeals appears in Carmelo Correa Ruiz, et als., v. Honorable Luis Fortuño, et als., No.06-2578, (1st Cir. July 7, 2009) (Appendix B- pag. 47a-48a).

JURISDICTION

The Court of Appeals entered its judgment on July 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved in this case is an Age Discrimination in Employment Act (ADEA) exemption contained in 29 U.S.C. § 623(j), which states as follows:

> Section 623 (j) states: Employment as firefighter or law enforcement officer.
> It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any

individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharge after the date described in such section, and the individual has attained —

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996; or

(ii) if applicable State or local law was enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996 and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

The before mentioned section of ADEA makes reference to another disposition of the statute contained in 29 U.S.C. §623(3) which reads almost in its entirety as follows:

> (a) STUDY. Not later than 3 years after the date of enactment of this Act, the Secretary of Health and Human Services, acting through the Director of the National Institute for Occupational Safety and Health (referred to in this section as the "Secretary"), shall conduct, directly or by contract, a study, and shall submit to the appropriate committees of Congress a report based on the results of the study that shall include---
> (b)...
> (c) ADVISORY GUIDELINES. Not later than 4 years after the date of enactment of this Act, the Secretary shall develop and issue, based on the results of the study required by subsection (a), advisory guidelines for the administration and use of physical and mental tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of the jobs of the officers and firefighters,
> (d) JOB PERFORMANCE TESTS (1) IDENTIFICATION TESTS. – After issuance of the advisory guidelines described in subsection (c), the Secretary shall issue regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption described in

section 4(j) of the Age Discrimination in Employment Act of 1967 with respect to firefighters or law enforcement officers who have attained an age of retirement described in such section 4(j). (2) USE OF TESTS.—Effective on the date of issuance of the regulations described in paragraph (1), any employer seeking such exemption with respect to a firefighter or law enforcement officer who has attained such age shall provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate physical and mental fitness by passing a test described in paragraph (1), in order to continue employment.

The Civil rights Act of 1871 42 USC 1983 which reads as follows:

"Every person under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

2nd sentence of Section 1, article XIV of the United States Constitution which reads as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT

In August 2003, former Police Superintendent Victor M. Rivera Gonzalez, began to send letters to members of the Police Force of the Commonwealth of Puerto Rico stating that Act No. 181 of 2003 (3 PRLA 766 g) was signed by the former governor of Puerto Rico, Sila M. Calderon, reducing the age of retirement for the Puerto Rico Police and the Fire Fighters Corp., from 65 to 55.

Petitioners, police officers of the caption, filed a claim for age discrimination in the United States District for the District of Puerto Rico, Case No. 04-1775. The claim was also filed under 42 U.S.C. 1983 for damages against the individual defendants for violation of the due process clause of the 14th amendment because no hearing whatsoever was granted to them before their

involuntary dismissal from their jobs. The wife's and siblings of the police officers invoked supplementary jurisdiction under 28 USC 1367 and joined as plaintiffs requesting damages under article 1802 of the P.R. Civil Code, 31 P.R.C.A. 5141, which reads as follows:

"A person who by act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done: Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity".

In their complaint the police officers request reinstatement to their prior posts and back pay. Compensatory damages under 42 USC 1983 was requested against defendants sue in their personal capacity. Prospective injunctive relief is requested against all codefendants sued in their official capacity under Ex parte Young 209 U.S. 123 (1908). The due process clause of the 14th amendment of the U.S. Constitution is invoked by plaintiff in their complaint. Due to the fact that some of the original defendants

were substituted in their post during the course of the litigation it is necessary to clarify as follows: Defendant Hon. Sila M. Calderón, the former governor, was sued in her personal and official capacity. When she ceased to be governor, she was replaced as defendant in her official capacity by the new governor who won the elections in Puerto Rico, Hon. Anibal Acevedo Vilá. Mrs. Calderón was kept as defendant in her personal capacity. Later on, Hon. Acevedo Vila lost the election to Hon. Luis Fortuño who became governor of Puerto Rico. Then, Hon. Acevedo Vila was replaced in his official capacity by Hon. Luis Fortuño. In relation to codefendant Victor M. Rivera González, who was the police superintendent under Mrs. Calderon administration, he was replaced in his official capacity by Mr. Pedro Toledo as the new superintendent who had been appointed to the post by Hon. Acevedo Vilá. Codefendant, Mr. Rivera González, was kept in the

complaint in his personal capacity. Later on, Mr. Toledo was replaced as codefendant in his official capacity by the new superintendent Mr. Jose Figueroa Sancha, who was appointed to the post by the present governor, Hon. Luis Fortuño. A Motion to dismiss was filed by respondents. On November 21, 2005, the District Court entered judgment dismissing with prejudice all federal law claims and dismissing without prejudice the supplemental law claims.

Petitioners filed a timely Motion for Reconsideration which was denied. Afterwards, petitioner filed a timely appeal to the United States Court of Appeal for the First Circuit, case no. 06-2578.

The Court of Appeals denied the appeal and on July 7, 2009 affirmed the district court. See Appendix A - 1a – 46a.

REASONS FOR GRANTING THE PETITION

Petitioners requests from this Honorable Court to grant their petition for a writ of certiorari pursuant to Rule 10(c) of the Rules of this Court, because the First and Seventh Circuits have decided an important question of federal law, namely the ADEA, that has not been, but should be decided by this Court. See rule 10 (c). The issue here is of national and general concern to hundred of thousands of police officers, firefighters and their families. If this Hon. Court issue the certiorari requested by the petitioners, it will affect probably millions of American citizens in this nation. The issue, we believe, is of first impression before this Hon. Court. This Honorable Court as of today, has not decided the important issue as to the application of the ADEA's amendment of 1996 requiring physical and mental test before terminating a police officer from his job due to a state law fixing an age for retirement. So far, the issue has been handled by Federal District Courts. See

Drnek v. City of Chicago, 192 F. Supp. 2d 835 (2002) and Glennon v. Village of Barrington, 2000 US 13086. This last case was decided before the 4 years granted by congress to the Secretary of Health to issue guidelines and regulations for fitness tests had not elapsed. Later on, the 7th Circuit decided the case of Minch v. City of Chicago, 363 F 3d 615 (2004). The case of Minch came twice before this Honorable Supreme Court and certiorari was denied in both instances. See James D. Minch, et al., v. City of Chicago, Illinois, 543 U.S. 879 (2004). The other case of Minch was decided on January 7, 2008 cited in 128 S. Ct. 924. Also the 1st Circuit, in our case, dealt with the issue mentioned before. See Carmelo Correa Ruiz, et al., v. Honorable Luis Fortuño, et al., slip opinion # 06-2578, 1st Circuit, decided on July 7, 2009. In the case of Minch, the 7th circuit addressed the issue of whether it was necessary to give mental and

physical exams before terminating police officers or firefighters. So far, we have not find any opinion from the Supreme Court of the United States that has addressed the issue of whether before terminating a police officer or firefighter from his job because of a local or state law fix a termination retirement age, mental and physical exams have to be given. But the Minch Court said "The failure to promulgate guidelines and regulations for fitness testing gives rise to an ambiguity in the statute. Section 623 (j) (1) purports to condition applicability of the exemption on the state or local governments compliance with section (3) (d) (2) of the 1996 amendment". Then the Minch court ruled that section (3) (d) (2) of the 1996 amendment to ADEA is meaningless at this juncture. The 1st Circuit, in our case, adopted this rationale of the Minch case and Minch adopted the rationale of the District Court case of Drnek v. City of Chicago, 192 F. supp 2d (2002) .

The rationale in these 3 cases lead us to bad law. Why? Because the intention of Congress was the protection of old timers when providing an exemption to ADEA. A good rationale should had being to disregard the 1996 amendment for the time being, because no fitness test were available and then go back to the 1986 amendment and apply the same. We say this because the base of the whole 1996 amendment is section 3 (d) (2). The weight and the force of the statute is section 3 (d) (2). In other words, without the availability of the fitness tests the rest of the statute should be frozen, and kept in suspense. Judge Elain Bucklo in Drnek, came close to our rationale when she said in her opinion "One interpretation of section 623, the one rejected in Glennon (Glennon v. Village of Barrington 2000 US 13086) is that the exemption is **void ab initio** because it required compliance with non existent regulations". But we call the attention of the

court to the fact that Glennon was decided before the 4 years the Secretary had to issued the guidelines & regulations had not elapsed.

The 1st Circuit, in our case, followed and copied the rationale of Minch, and Minch followed the rationale of Drneck v. City of Chicago, 192 F. Supp. 2d 835 (2002) which as said before is a District Court case.

So far, the seventh circuit in Minch and the first circuit in Carmelo Correa Ruiz, et al., (our case) have decided that it is not mandatory to administer physical and mental tests to police officers and firefighters before retiring them against their will although the amendment to ADEA of 1996, orders physical and mental tests before terminating a police officer or firefighter.

Both appellate courts have ignored and bypassed the Congressional mandate to the Secretary of Health and Human Services (Secretary), that

required from such public official to issue advisory guidelines for the administration and use of physical and mental tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of their jobs. The period fixed by the U.S. Congress for the issuance of such guidelines and regulations was four years after the date of enactment of the 1996 Act. To this day, the Secretary has not complied with such mandate. Is our position that the 7th and 1st circuit have ignored the clear mandate of congress requiring physical and mental exams before termination of a police officer from his job creating confusion across the land. Guidance and uniformity as to such issue is needed from this Honorable Court. This is the 1st opportunity this Supreme Court has to clear up the confusion created by lower courts as to this issue. Also, this Judicial trend is limiting the right of police officers and

firefighters to have access to the courts when they invoke the 1996 ADEA Amendment requiring fitness tests be performed on them before being terminated from their jobs. It is against a good construction of the 1996 ADEA amendment by inferior courts to ignore the part of the amendment (the one that required fitness test before termination) and work with the other half of such amendment.

The Court in *Drneck v. City of Chicago*, 192 F. Supp. 2d 835 (2002), quoted with approval by the Seventh and First Circuits, reasoned that "The provision in § 623(j)(1) for compliance with § 3(d)(2) merely imposed an obligation on employers to provide tests when and if suitable tests became available; it did not make tests a condition precedent to the operation of the exemption." If this tendency is allowed, the other circuits may join the 1st and 7th circuits. Therefore, this Hon. Supreme Court should give to the lower courts an

azimuth on how to manage the situation so far because the Secretary of Health has disobeyed the mandate of congress ordering him to draft guidelines and the proper tests required by law. We say this because the congressional amendment of ADEA of 1996 is very clear and not subject to interpretation by the courts.

The reasoning in Minch (7th Circuit) and in our case (1st Circuit) departs from the clear language of section § 623(j)(1), that requires an employer to comply with § 3(d)(2) of the ADEA. In return, section 3(d)(2) was supposed to enter into effect four years after the enactment of the 1996 ADEA amendments. Such section states that:

> Effective on the date of issuance of the regulations described in paragraph (1), any employer seeking such exemption with respect to a firefighter or law enforcement officer who has attained such age **shall** provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate physical and mental fitness by passing a test described in paragraph (1), in order to continue employment.

Two things are clear from this quotation: First, that the effective date of the exemption that allows discrimination because of age, was conditioned to the issuance of the guidelines and regulations by the Secretary; and second, that the employer who wishes to discharge a police officer or firefighter "**shall provide**" to each employee an annual opportunity to demonstrate physical and mental fitness. This wording does not make such tests optional as the district court in *Drneck*, 192 F. Supp 2d at 842, suggests by concluding that the exemption in the provision was subject to the use of fitness tests when and if suitable tests were ever made available by the Secretary.

It is petitioners contention that insofar as the guidelines and regulations have not yet been issued by the Secretary, the ADEA exemption contained in 29 U.S.C. §623(j) is in a waiting compass and therefore, its effective date is yet to come. Thus, in the absence

of a specified date for the 1996 amendments to enter into effect, the applicable disposition of the ADEA should be the 1986 "safe harbor provision"[1] that allowed states and political subdivisions of a state to enforce age based mandatory retirement only according to statutes that were in effect as of March 3, 1983. We believe this Hon. Supreme Court should declare probable jurisdiction in our case and eventually should adopt this solution against the disobedience of the Secretary of Health who so far has disobeyed a clear congressional mandate.

---

[1] Federal jurisprudence created the term in reference to the 1986 ADEA amendments that allowed states and local governments to enforce mandatory retirement for police officers and firefighters as long as it was according to a statute that was in effect as of March 3, 1983. See *Kopec v. City of Elmhurst*, 193 F.3d 894(7th Cir. 1999). The amendment had an expiration date: December 31, 1993.

Petitioners request from this Honorable Court to decide whether physical and fitness tests is a condition precedent to involuntary retirement for police officers and fire fighters regardless of the omission of the Secretary of not issuing guidelines and regulations according to the Congressional mandate and if no fitness tests are available, hold the 1996 amendment in a frozen or suspended state and apply the 1986 amendment. Phrased in the opposite sense, whether a state or a subdivision of a state may enact a law after September 30, 1996 (the date of enactment of the 1996 ADEA amendments) lowering the mandatory age for retirement for police officers and firefighters as low as 55 without providing them an annual opportunity to pass a physical and mental fitness test as required by §3(d)(2) of ADEA.

In *EEOC v. Wyoming*, 460 U.S. 226 (1983), this Court decided that Congress had the power under the

Commerce Clause to extend the ADEA provisions to the states. Mandatory retirement exemptions have been held to be an extremely narrow exemption to the general prohibition of age discrimination contained in the ADEA. See *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985).

In *State Police for Automatic Retirement Association v. Difava*, 317 F.3d 6 (1st Cir. 2003), the First Circuit held that ADEA was applicable to states as to injunctive relief was concerned. In *Gately v. Commonwealth of Mass.*, 2 F.3d 1221 (1st Cir 1993), the First Circuit enjoined the Commonwealth from enacting a law that lowered the retiring age from 65 to 55.

The Omnibus Consolidated Appropriations Act, 104th Congress-2nd session, Section 119,[2] amended the ADEA to specifically insert the requirement that an

---

[2] PL 104-208, September 30, 1996, 110 Stat 3009.

employer had to comply with section 3(d)(2) before any employer makes use of the exemption contained in 29 U.S.C. § 623(j). It also appropriated $5,000,000 to carry out the mandate for the issuance of guidelines and regulations.

If the Secretary has not to this day issued the guidelines and regulations mandated by the U.S. Congress, then, Puerto Rico Law 181 must be in violation of ADEA, because the administration of physical and mental fitness tests was established in the 1996 ADEA amendments as a condition precedent to mandatory retirement.

It has been resolved by the this Court that a public officer that enforces public policy with illegal or impure motives and that such policy violates constitutionally protected rights, may not be shielded by qualified immunity. See *Monell v. Dept. of Social*

Services of the City of New York, 436 U.S. 658 (1978); and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

This Honorable Court, through the expedition of the writ of certiorari herein requested, may fill in the vacuum and illustrate the district and circuit courts all across the Nation if the ADEA requires the administration of physical and mental tests as a condition precedent to mandatory retirement for police officers and firefighters. Or in the alternative, if the states, counties and cities are allowed under ADEA to enact laws or ordinances lowering the mandatory retirement age for police officers and firefighters previously in place as of March 3, 1983. In relation to the notice pleading vs. the heightening standard of pleading, we believe our case offer to this Hon. Court the opportunity to revisit the last two cases decided by this higher court. The two cases are Akos Swierkiewicz v. Sorema, 534 US 506 (2002) and the

case of Bell Atlantic Corp., et al., petitioners v. William Twombly, 550 U.S. _____ 2007 decided on May 21, 2007. We said this because confusion has developed within the Bar due to the fact that both cases deal with the sufficiency of the pleadings. If this court issue the certiorari in our case, will be able to distinguished between cases requiring notice pleading and other cases requiring heightening pleadings. In our case, defendants filed a Motion to Dismiss under rule 12 of the F.R.C.P. In our case which is a labor case, we have to go to the case law of Akos Swierkiewicz v. Sorema, 534 U.S. 506 (2002). Hon. Magistrate Thomas wrote the opinion of the case. This case was decided on February 26, 2002. It is said in the opinion that it is incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he might ultimately need to prove to succeed on the merits if direct evidence of discrimination was

discovered. In other parts of the opinion, this Honorable Court decided that the federal rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal rules, and not by judicial interpretation." Rule 8 (a) establishes a pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Citing the Schewer case 416 U.S. at 236. The court also said that the prima facie case under McDonnell Douglas was an evidentiary standard, not a pleading requirement. The Sorema case like our case was an age discrimination cause of action under ADEA, 29 U.S.C. § 621 et seq. Based on the case of Sorema, we turn to the pleadings of plaintiffs' 8th

amended complaint. See appendix C pag. 49a-69a. Notice pleading is the standard to be applied to such complaint. See paragraph 18 of the complaint where it is alleged that the former governor, defendant Hon. Sila M. Calderon and the former superintendent, defendant Victor Rivera González, met together and planned together the termination of plaintiffs' police officers from their jobs and replace them by younger police employees. An inference can be made that the motive of those two codefendants was to discriminate against the dismissed police officers plaintiff because of age. At page 23 of the Eight Amended Complaint specific facts are given showing that law no 181 which was an administration piece of legislation, was capricious and discriminatory because of age. See letters a, b and c of paragraph 23. After plaintiffs were terminated from their jobs. Mrs. Calderon administration through the police superintendent, started to recruit police officers

that already were terminated when they reached 55 years of age. At paragraph 15 of the 8th Amended Complaint it is alleged that defendants did not act due to a bona fide retirement plan. Paragraph 7 of the 8th Amended Complaint avers that former governor Calderon and former superintendent Rivera González agreed between them to get rid of a group of police officers who were old timers with the purpose of replacing them by younger officers. A fact that is to be seriously analyzed to reach a subterfuge inference is that two years after act no. 181 was passed by the legislature of Puerto Rico, Act. No. 22 of the year 2005 was passed increasing the retirement age for police officers and firefighters from 55 to 58. See appendix D pag. 70a-75a in relation to act no. 181 and appendix E pag. 76a-81a for act no. 22 of the year 2005. In relation to the allegation in the complaint that the police officers were terminated without any hearing

whatsoever, we cite the case of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). It is our position that because the exemption found in the amendment of ADEA of 1996 were erroneously and illegally applied to plaintiffs because no fitness test were given to them before their termination, they were entitled to some sort of informal hearing but none was granted. Is our theory that the amendment of ADEA that should had been applied to plaintiff was the 1986 amendment which prohibited any state or local government to pass a law or an ordinance lowering the retirement age that was in effect in the year 1983. Because in that year plaintiffs were supposed to retire at 65 years of age, their termination from their jobs at 55 years of age without due process was a violation of the 14th amendment of the U.S. Constitution.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted and the judgment below reversed.

RESPECTFULLY SUBMITTED.

s/Jesus Hernandez Sanchez
JESUS HERNANDEZ SANCHEZ
1519 Ponce de Leon Ave.
First Bank Bldg., Suite 806
San Juan, Puerto Rico 00909-1791
Tel. (787)722-5814
Fax (787)725-1112
e-mail hersanlaw@prtc.net
Counsel of record for petitioners

APPENDIX

	Pages
A. Decision of Circuit Court of July 7, 2009...	1a-46a
B. Judgment of July 7, 2009.....	47a-48a
C. Eight Amended Complaint.....	49a-69a
D. Act No. 181 of 2003.....	70a-75a
E. Act No. 22 of 2005.....	76a-81a
F. Addendum A: List of Parties.....	82a-84a

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 06-2578

CARMELO CORREA-RUIZ, FORMER COLONEL, ET AL.,

Plaintiffs, Appellants,

DANIEL GARCIA, ET AL.,

Movants,

v.

HONORABLE LUIS FORTUÑO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTIRCT OF PUERTO RICO
[Hon. Salvador E. Casellas, U.S. District Judge]

Ariel Hernandez Santana, with whom Jesus Hernandez Sanchez and Hernandez Sanchez Law Firm were on brief, for appellants.

Susana I. Peñagaricano-Brown, Assistant Solicitor General, with whom Salvador J. Antonetti-Stutts, Solicitor

General, Mariana Negrón-Vargas, Deputy Solicitor General, and Maite D. Oronoz-Rodríguez, Deputy Solicitor General, were on brief, for appellees.

July 7, 2009

---

*Of the District of New Hampshire, sitting by designation.

LIPEZ, Circuit Judge. The Age Discrimination in Employment Act ("ADEA") contains an exemption provision that allows state and local governments to set mandatory retirement ages for law enforcement officers and firefighters. See 29 U.S.C. § 623 (j). In this case, we examine for the first time revised criteria for invoking that exemption, including a provision that conditions its use on the employer's compliance with fitness testing regulations that have yet to be promulgated by the Secretary of Health and Human Services. Id. Appellants are more than two dozen former Puerto Rico police officers who claim that their forced retirement at age fifty-five, pursuant

to Puerto Rico law 181, violated the ADEA and the Due Process clause of the Fourteenth Amendment. See P.R. Laws Ann. Tit. 3, § 766g (2003) ("Law 181"). The officers filed suite against the Commonwealth of Puerto Rico, its police department, the current and former governors, and the current and former police superintendents, seeking declaratory and injunctive relief and damages. The district court dismissed all claims, [1] concluding that Law 181, Puerto Rico's mandatory retirement law, is consistent with the ADEA and that appellants' terminations also conformed to constitutional requirements. We agree and therefore affirm.

I.

A. Applicable Age Discrimination Laws

1. The ADEA

---

[1] Appellants also alleged a supplemental claim under Article 1802 of the Puerto Rico civil Code, P.R. Laws Ann. tit. 31, § 5141. The district court dismissed the federal claims with prejudice and the Commonwealth claim without prejudice. Given our disposition of the federal claims, we do not further consider the supplemental claim. See Marrero-Gutierrez v. Molina, 491 F. 3d 1, 7 (1st Cir. 2007) ("A district court retains the discretion... to decline to exercise supplemental jurisdiction where the district court has dismissed all claims over which it had original jurisdiction.").

As originally enacted in 1967, the ADEA did not apply to States and their political subdivisions. EEOC v. Wyoming, 460 U.S. 226, 233 (1983). [2] It thus had no impact on the age limits that many local governments had adopted for police and firefighting personnel. See, e.g., Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353, 358 (1985) (evaluating city code provision, adopted in 1962, requiring mandatory retirement of most firefighting personnel at age fifty-five); Minch v. City of Chicago, 363 F. 3d 615, 618 (7th Cir. 2004) (noting Chicago's requirement, "[a]s early as 1939," that city firefighters retire at the age of sixty-three); Binker v. Pennsylvania, 977 F. 2d 738, 742 n.2 (3d Cir. 1992) (discussing Pennsylvania law, first enacted in 1929, requiring state police officers to retire at age sixty). Among such provisions was Puerto Rico's Law 447, adopted

[2] A chronology of the Congressional action and Supreme Court cases leading up to the current ADEA exemption for the mandatory retirement of police officers and firefighters appears at the end of this opinion.

in May 1951, which established a mandatory retirement age of sixty-five for both police officers and firefighters.

Congress extended the ADEA to cover government employers in 1974, and the Supreme Court quelled uncertainty over the constitutionality of that amendment nine years later in EEOC v. Wyoming, 460 U.S. at 243. [3] Once the ADEA became applicable to their employees, States and localities could retain maximum hiring and retirement ages only if they could show that age was a bona fide occupational qualification for particular positions. See 29

---

[3] Doubt about whether the ADEA could be applied to state and local governments had arisen in the aftermath of the supreme Court's decision in national League of Cities v. Usery, 426 U.S. 833 (1976). See Kopec v. City of Elmhurst, 193 F. 3d 894, 896-97 97th Cir. 1999). In Usery, which was subsequently overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the Court held that the Tenth Amendment barred extension of the minimum-wage and overtime provisions of the Fair Labor Standards Act to state and local governments. 426 U.S. at 851. Although Wyoming eliminated Tenth Amendment concerns about the ADEA, the Supreme Court later held that congress did not have the authority to abrogate the States'sovereign immunity from suit by private individuals for monetary relief under the ADEA. See Kimel v. Florida Bd. Of Regents, 528 U.S. 62, 91 (2000). Injunctive relief, however, remains available. State Police for Automatic Ret. Ass'nv. DiFava, 317 F. 3d 6, 12 (1st Cir. 2003).

U.S.C. § 623 (f) (1).[4] This so-called "BFOQ exception" is "'extremely narrow,'" and eligibility may turn on whether the employer can demonstrate" a factual basis for believing [] that all or substantially all persons over the age qualification [] would be unable to perform... the duties of the job involved." Gately v. Massachusetts, 2 F. 3d 1221, 1225-26 (1st cir. 1993) (quoting W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 412, 414 (1985) (additional citation and emphasis omitted; some alteration in original))). Thus, with the 1974 amendment, States and localities were subject to the same restrictive standard as private employers for justifying the use of age in employment decisions.

In 1986, however, Congress again amended the ADEA to provide a limited exemption for the mandatory retirement of state and local law enforcement officers and firegighters. See 29 U.S.C. § 623 (j) (1988). The

---

[4] Section 623 (f) (1) allows employers "to take any action otherwise prohibited under [the statute] ... where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business...."29 U.S.C. § 623 (f) (1).

exemption, known as the "safe-harbor" provision, permitted any state or local government that had in place age restrictions for law enforcement officers or firefighters on March 3, 1983 – the day after the decision of EEOC v. Wyoming – to reinstate those restrictions. The amendment did not allow adoption of new mandatory retirement provisions, and the exemption for pre-existing laws had a limited life span. "[D]esigned to provide states an opportunity to adjust to the Supreme Court's decision, "DiFava, 317 F. 3d at 9 n.3., the exemption expired on December 31, 1993, when mandatory retirement provisions adopted by state and local governments one again became subject to attack for age discrimination.

The reversion to past practice was short-lived. In 1996, congress reinstated the safe-harbor provision, with some revisions and without a sunset provision, retroactive to its December 31, 1993 termination date. See 29 U.S.C. § 623 (j). Significantly, the 1996 legislation broadened the

exemption to allow States and localities that had not had age restrictions before the Wyoming decision to enact such limits. Under this renewed safe-harbor provision, a public employer may impose mandatory retirement on law enforcement officers and firefighters who either attain the age of retirement that was in place for those employees as of March 3, 1983, or – if the employer's age limit was enacted after the 1996 amendment took effect – the higher of the age contained in the post- 1996 enactment or age fifty-five. Like the original version of the exemption, the 1996 amendment also provided that any exempted discharge be "pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of [the ADEA]." 29 U.S.C. § 623 (j) (2).[5]

---

[5] The full text of section 623 (j) is as follows:

(j) **Employment as firefighter or law enforcement officer**
It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken –

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3 (d0 (2) of the

The 1996 legislation also directed the Secretary of Health and Human Services ("HHS") to study and report to Congress within three years on the availability of tests or other methods for assessing the ability of law enforcement officers and firefighters to complete public safety tasks. Within four years, the Secretary was to issue

---

Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained-

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or
(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of -
(I)the age of retirement in effect on the date of such discharge under such law; and
(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

advisory guidelines on the use and administration of physical and mental fitness tests to assess the competency of such personnel, and the guidelines were to be competency of such personnel, and the guidelines were to be followed by regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption." Pub. L. No. 104-208 § 119 (2); 110 Stat. 3009, 3009-24-25 (1996). The legislation further provided that, once the regulations were issued, employers relying on the exemption would be required to give public safety personnel who reached retirement age an annual opportunity to show fitness for duty by passing such attest. 110 Stat. 3009-25. Individuals who passed the test could not be forced to retire. Id.

The expectation that fitness tests would be developed and prescribed in regulations became part of the law as codified. The statute requires the employer to comply with "section 3 (d) (2) of the Age Discrimination in

Employment Amendments of 1996 if the individual was discharged after the date described in such section."29 U.S.C. § 623 (j)(1). The reference to "section 3 9d) (2)" has been understood to be a mistaken reference to section 2(d) (2) of Public Law 104-208, which requires employers to offer the fitness tests deemed appropriate by the Secretary. See Pub. L. No. 104-208 § 119 (2) (d) (2), 110 Stat. 3009, 3009-25 (1996); § 623 (j) Historical and Statutory Notes. Section 2 (d) (2) provides that the requirement does not take effect, however, until "the date of issuance of the regulations" identifying such tests.[6]

---

[6] Section 2 9d) of Pub. L. No. 104-208, § 119, states:
(d) JOB PERFORMANCE TESTS –
(1) IDENTIFICATION OF TESTS. – After issuance of the advisory guidelines described in subsection (c), the Secretary shall issue regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption described in section 4 (j) of the Age Discrimination in Employment Act of 1967 with respect to firefighters or law enforcement officers who have attained an age of retirement described in such section 4 (j).
(2) USE OF TESTS. – Effective on the date of issuance of the regulations described in paragraph (1), any employer seeking such exemption with respect to a firefighter or law enforcement officer who has attained such age shall provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate

Thus, § 623 (j) (1) effectively states that the employer's obligation to administer fitness tests to individuals who reach mandatory retirement age begins on "the date of issuance of the regulations," which is the date described in section 2 (d) (2) of the ADEA amendments. However, neither the advisory guidelines on the use and administration of tests, nor any regulations identifying appropriate tests, have yet been issued. On its face, then, the statute anticipates fitness testing as a prerequisite for mandatory retirement, but the tests required to be used have not yet been identified. [7]

2. Puerto Rico Law 181

---

physical and mental fitness by passing a test described in paragraph (1), in order to continue employment.

[7] The 1986 legislation also had ordered the Department of Labor and the Equal Employment Opportunity Commission ("EEOC") to conduct a study of the feasibility of fitness testing for public safety personnel and directed the EEOC to promulgate guidelines on the administration and use of such tests. Researchers from the Center for Applied Behavioral Sciences of The Pennsylvania State University conducted the study for the government entities and concluded that "age was a poor predictor of performance in public safety occupations, "but no guidelines were issued. See H.R. Rep. 103-314 (Nov. 1, 1993).

In August 2003, the Puerto Rico legislature amended its longstanding mandatory retirement law for Commonwealth police officers and firefighters, Act. No. 447 of May 15, 1951, under which age sixty-five had been the upper limit of their employment. The new Government Personnel Retirement Act, Law 181, lowered the mandatory retirement age to fifty-five for police officers and firefighters with thirty years of service, although the superintendent of the police force could authorize an officer to serve up to an additional twenty-four months as a member of the Police Reserve force. P.R. Laws Ann. tit 3, § 766 g (2003).

The preamble to Law 181 framed the retirement scheme as a way to promote modernization and innovation by bringing new officers into the public safety forces. The preamble further stated that "no discrimination is being applied to the members of the Police or Firefighters Corps for reason of age." Rather, the motivation was "to give a

higher security to the people and to protect the security" of police officers and firefighters.

The mandatory retirement provision was again amended in 2005. Under Act No. 22, police officers and firefighters with thirty years of service could take voluntary retirement at age fifty-five, but the mandatory retirement age was changed to fifty-eight. P.R. Laws Ann. tit. 3, § 766g (2005).

B. Procedural Background

Four days after law 181 was enacted, the Superintendent of the Puerto Rico Police Department sent letters advising officers who had reached age fifty-five that they had thirty days to complete the necessary documents for their retirement. More than two dozen officers who were involuntarily terminated under Law 181 subsequently filed this action against the Commonwealth of Puerto Rico, its police department, Governor Sila M. Calderón-Serra ("Calderón"), Police Superintendent Victor M. Rivera-

González, [8] alleging violations of the ADEA and, under 18 U.S.C. § 1983, the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution. They also alleged a supplemental claim under Article 1802 of the Puerto Rico Civil Code, P.R. Laws Ann. tit. 31, § 5141.

In their complaint, the plaintiffs claimed that former Governor Calderón and former Superintendent Rivera-González had agreed "to get rid... of a group of old timers" within the Police Department and replace them with younger officers. They requested declaratory and injunctive relief to invalidate and enjoin enforcement of Law 181 and to establish their right to due process before being terminated. They also sought compensatory and punitive damages against the individual defendants.

---

[8] Luis Fortuño, the current governor, was later added to the case in his official capacity, and Calderón remained a defendant in her personal capacity. Jose Figueroa Sancha, the current superintendent of police, has been substituted for Cartagena as a defendant.

The defendants filed a motion to dismiss under Fed. R. Civ. P. 12 (b) (6), arguing that the Eleventh Amendment barred the claims against the Commonwealth, the Police Department, and the individual defendants in their official capacities. They further asserted that the plaintiffs had failed to state claims under the ADEA and section 1983, and they alternatively raised a qualified immunity defense.

In ruling on the motion, the district court noted plaintiffs concession that the Eleventh Amendment barred monetary damages against the non-individual defendants and the individual defendants in their official capacity, and it accepted defendants' assertion, uncontested by plaintiffs, that there is no individual liability under the ADEA. Correa-Ruiz v. Calderón-Serra, 411 F. Supp. 2d 41, 47 (D.P.R. 2005). The court also found no merit in the substantive claims, including plaintiffs' contentions that Law 181 is a subterfuge to evade the ADEA and that the Commonwealth violated the ADEA by forcing plaintiffs' retirements without

first administering a fitness test as contemplated by section 623 (j). Id. At 46-52. The court dismissed all federal claims with prejudice and the supplemental claim under Commonwealth law without prejudice. Id. at 52-53. The court also denied plaintiffs' motion for reconsideration.

Plaintiffs appeal both the judgment of dismissal and the denial of reconsideration. They argue that the district court improperly dismissed their complaint based on its erroneous interpretation of the ADEA and its failure to apply well established principles of due process entitling them to a hearing before they were terminated. [9] They also claim that the Supreme Court's Eleventh Amendment jurisprudence does not foreclose the availability of damages from the Commonwealth under a due process theory.

Our review of the district court's grant of a motion to dismiss is novo. Fitzgerald v. Harris, 549 F. 3d 46, 52 (1st

[9] Plaintiffs do not present an equal protection argument on appeal, and we therefore deem any such claim waived. See Lavin v. Dalva Brothers, Inc., 459 F. 3d 68, 75 n.4 (1st Cir. 2006) (noting that claims not raised in opening appellate brief are waived).

Cir. 2008). "To survive a motion to dismiss, the complaint must allege 'a plausible entitlement to relief.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)). We turn first to the ADEA claim and then briefly discuss the due process claim. Our disposition of these claims makes it unnecessary to consider appellants' arguments concerning available remedies.

II.

On appeal, plaintiffs offer numerous theories to support their contention that the defendants violated their rights under the ADEA. Among these claims, we discern three rationales for recovery that warrant our attention: (1) plaintiffs' terminations in accordance with Law 181 were unlawful because the ADEA bars a state or local government from lowering a retirement age that was in effect as of March 3, 1983, (2) plaintiffs' mandatory retirement violated the ADEA because they were not provided with fitness testing to determine their capacity to continue working, and (3)

plaintiffs' terminations did not comply with § 623 (j) (2) of the ADEA because their discharges were not "pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter."

A. The Lowered Retirement Age of Law 181 and the ADEA

Plaintiffs maintain that the 1986 and 1996 amendments to the ADEA, which created the exemption for age-based termination of public safety personnel, prohibit the reduction of a mandatory retirement age that was applicable on March 3, 1983. They contend that § 623 (j) permits enactment of new age limits only in States and localities that had no mandatory retirement law in effect at that time. Because Puerto Rico's mandatory retirement age for police officers was sixty-five in March 1983, plaintiffs assert that Law 181, with its lowered age

limit, must be invalidated as inconsistent with the federal law. [10]

In construing a statute, we begin with its plain meaning, and "[i]f the meaning of the text is unambiguous our task ends there as well." United States v. Godin, 534 F. 3d 51, 56 (1st Cir. 2008). A statute is not ambiguous unless" 'it admits of more than one reasonable interpretation.'" Id. (quoting Gen. Motors Corp. v. Darling's, 444 F. 3d 98, 108 (1st Cir. 2006)). The language of § 623 (j), as amended in 1996, does not support plaintiffs' proposed interpretation of the safe-harbor provision. The statute explicitly provides that States or their subdivisions may discharge a law enforcement officer or firefighter pursuant to a mandatory retirement plan that either was in effect on

[10] This argument was not raised before the district court and therefore could be treated as waived. See In re New Motor Vehicles Canadian Exp. Antitrust Litig., 533 F. 3d 1, 6 (1st Cir. 2008) We have nevertheless chosen to address it in order to clarify the scope of the safe-harbor provision.

March 3, 1983 or was enacted after September 30, 1996. The only age-related limitation on the latter option is that the discharge occurs no earlier than age fifty-five. 29 U.S.C. § 623 (j) (1) (B) (ii). Nothing in the language of the provision even suggests that governments that had mandatory retirement laws in place as of March 3, 1983 could not enact new laws with lower retirement ages after September 30, 1996.

Plaintiffs rest their argument in part on an explanatory "Rule of Construction" contained in the background information that follows § 623 (j) in the United States Code. The note, as it appeared in the 1996 legislation, states:

CONSTRUCTION.—Nothing in the repeal, reenactment, and amendment made by subsections (a) and (b) shall be construed to make lawful the failure or refusal to hire, or the discharge of, an individual pursuant to a law that-

(1) was enacted after March 3,1983 and before the date of enactment of the Age Discrimination in Employment Amendments of 1996; and

(2) lowered the age of hiring or retirement, respectively, for firefighters or law enforcement officers that was in effect under applicable State or local law on March 3, 1983.

Pub. L. No. 104-208 § 119 (1) , 110 Stat. 3009, 3009-24 (1996).

Plaintiffs argue that this note eliminates any ambiguity in the language of the ADEA amendment s and shows that the Commonwealth was prohibited from lowering the mandatory retirement age for firefighters and law enforcement officers that was in effect as of March 3, 1983. By its terms, however, the note applies only to laws that were enacted between March 3, 1983 and "the date of enactment" of the 1996 ADEA amendments, which was September 30, 1996. Law 181 was enacted on August 15,

2003 – outside the time frame to which the note refers. Thus, rather than supporting plaintiffs' view that Law 181 violated the ADEA, this note is strong evidence to the contrary. If the prohibition were meant to extend to a law passed after the excluded period of time, the end date in the phrase would have been unnecessary. Thus, the only plausible interpretation of the note is that States and localities were permitted to enact laws lowering the mandatory retirement age for police officers and firefighters after passage of the 1996 amendment, so long as they complied with the requirements set out in the amendment.

Plaintiffs' reliance on our decision in Gately, 2 F. 3d 1221, where we invalidated a lowered retirement age, is equally misplaced. The mandatory retirement law at issue there was enacted in 1991 in connection with the consolidation of four Massachusetts police forces. Id. at 1224. Before the consolidation, officers in three of the forces had been subject to retirement at age sixty-five and officers

serving on the fourth force had been subject to retirement at age fifty. Id. the 1991 state legislation imposed mandatory retirement at age fifty-five on all members of the consolidated force. Id. We held that the 1986 amendment to the ADEA did not permit Massachusetts to lower the retirement age to fifty-five for the group of officers who, in 1983, were subject to retirement at sixty-five. Before adoption of the 1996 amendments, a mandatory retirement scheme enacted after March 3, 1983, imposing new or lowered age limits on employment, was permissible only if it qualified under the narrow BFOQ exception. See id. at 1225-26 (describing the ADEA "escape clause" that allows all "employers some limited flexibility to take age into consideration in business decisions").

Unlike Gately, this case is not governed by the 1986 amendment and, as we have explained, a state statute lowering the retirement age for public safety personnel is permitted by the 1996 amendment so long as the

amendment's other requirements are met. See Feldman v. Nassau County, 434 F. 3d 177, 182 (2d Cir. 2006) ("[T]he exception can absolve a state or local government of liability under the ADEA for an age limit in law enforcement hiring regardless of whether that age limit was in existence pursuant to local law at the time Wyoming was decided or whether it was enacted after the 1996 ADEA amendments that reinstated the law enforcement exception>") (citations omitted). [11] Law 181 is therefore not invalid as a result of its lower triggering age.[12]

---

[11] Indeed, we observed in DiFava that the safe-harbor provision allows states, if they choose, to continue to enforce against relevant law enforcement officers certain earlier age-based retirement laws (or to create new laws consistent with the mandates of the statute). "DiFava, 317 F. 3d at 14 (emphasis added). DiFava primarily concerned the Massachusetts statute we found invalid in Gately in light of the 1986 amendments, but its present-tense description of the law suggests an understanding of the then-current version of section 623 (j) consistent with the view we have articulated here.

[12] Because the 1996 version of § 623 (j) allows States and their subdivisions to impose mandatory retirement at age fifty-five or above, provision adopting such a limit do not need to meet the requirements contained in § 623 (f) (1) for a BFOQ exception. See Feldman, 434 F. 3d at 182 n.5 (holding that § 623 (j) by its terms relieves law enforcement agencies of having to establish that age is a BFOQ in order to discriminate on the basis of age"); Kopec, 193 F. 3d at 902 (noting that "[s]ection 623 (j) would... accomplish nothing if the exemption from the

B. The Fitness Testing Requirement

Plaintiffs content that, even if they were lawfully subject to retirement at age fifty-five, the Commonwealth had to give them the opportunity to avoid discharge by taking performance tests that could prove their physical and mental fitness to continue working. This is the testing described above, which Congress expected to be in place within about four years after enactment of the 1996 amendment. Although plaintiffs acknowledge that the particular tests referenced in the statute have never been identified by the Secretary of HHS, they insist that testing is nonetheless a prerequisite to their discharge. They claim that, in the absence of federally developed tests, Puerto Rico was required to devise its own evaluation system – or refrain from imposing mandatory retirement.

ADEA were conditioned upon a BFOQ showing "because" [t]hat requirement is already found in section 623 (f) (1)"); see also Knight v. Georgia, 992 F. 2d 1541, 1547 (11th Cir. 1993) (holding that, under the equivalent provision in the 1986 amendment, a BFOQ showing was not necessary).

We reject this reading of the statute. Although the language of § 623 (j) (1) requires careful parsing, it unambiguously requires testing as a pre-condition to mandatory retirement only for those employees who would be discharged after the Secretary of HHS promulgates appropriate tests.[13] As described above, section (j) (1) states that the testing requirement applies "if the individual was discharged after the date described in such section," and "such section" is "section 3 (d) (2) of the Age Discrimination in Employment Amendments of 1996." 29 U.S.C. § 623 (j)

---

[13] For convenience, we repeat the relevant portion of the provision:

> It shall not be unlawful for an employer which is a State ... to discharge any individual because of such individual's age if such action is taken-
>
> (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3 (d) (2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section ...

623 (j) (1) (emphasis added). The statute then goes on to list the permissible retirement ages depending on the time of enactment of the applicable mandatory retirement plan and, in subsection (2), requires that the plan be bona fide and not a subterfuge to evade unlawful discrimination.

(1). [14] The date referenced in section 9d) (20 is "the date of issuance of the regulations" the Secretary "shall issue... identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption." Pub. L. No. 104-208 § 119 (2), 110 Stat. 3009-25 (1996). Thus, when pieced together, the elements of the statutory requirement are that (1) employers seeking the benefit of the safe-harbor provision (2) must use the tests identified by the Secretary (3) once regulations identifying those tests have been issued.

Although the statutory language is not in our view reasonably susceptible to another interpretation, our conclusion would be the same if we deemed the provision ambiguous and found it necessary to consider legislative history to ascertain Congress's intent. See Godin, 534 F. 3d at 56 (noting that, "[i]f the statute is ambiguous, we look beyond the text to the legislative history in order to

[14] As explained earlier, the reference to section (3) (d) (2) should have been to section 2 (d) (2). See supra note 6 & accompanying text.

determine congressional intent"); see also Minch, 363 F. 3d at 620 n.4 (stating that "[t]he failure to promulgate guidelines and regulations for fitness testing gives rise to an ambiguity in the statute"); Drnek v. Chicago, 192 F. Supp. 2d 835, 840 (N.D. Ill. 2002) (concluding that "the plain language of § 623 is ambiguous" because "it leaves a gap by requiring employers to comply with regulations that have not been promulgated").

In a thoughtful discussion that was endorsed by the Seventh Circuit in Minch, see 363 F. 3d at 620 n.4, the district court in Drnek examined § 623 (j)'s legislative history at length before concluding that the public safety exemption in the provision was "subject to the use of fitness tests when and if suitable tests were ever made available by HHS." Drnek, 192 F. Supp. 2d at 842. The court cited comments made during floor debates on the proposed legislation that showed skepticism among members of

Congress about the adequacy of existing physical tests. See id. at 841-42.[15] The court then concluded:

[T]he legislative history suggests that the intent of the amendment was to reinstate an exemption from the ADEA allowing for age-based retirement for public safety officials because fitness tests were unreliable, expensive, and had potential discriminatory effects on women and minorities. The provision in § 623 (j) (1) for compliance with § 3 (d) (2) merely imposed an obligation on employers to provide tests

---

[15] For example, Representative Owens "noted that fitness tests in existence at that time tended to discriminate against women and minorities, and that they were not an effective substitute for age limits." Drnek, 192 F. Supp. 2d at 841 (citing 141 Cong. Rec. 9491, 9492). Representative Weldon also observed that "'[f]itness tests are not a valid alternative to age limits, ' apparently because of the shortcomings of existing tests, and that '[i]n the absence of a valid fitness test, age limits ensure our public safety teams are in peak condition.'" Id. (quoting 141 Cong. Rec. at 9492). Senator Moseley-Braun spoke directly to the issue of States and localities devising substitute tests:

> "[Y]ou may ask why State and local governments cannot just develop tests to screen out those individuals who may still retain their strength at the age of 60 or 70. However, there is no adequate test that can simulate the conditions that firefighters and police officers face in the line of duty."

Id. (quoting 141 Cong. Record 7765, 7766).

when and if suitable tests became available; it did not make tests a condition precedent to the operation of the exemption. Id. at 842.

We thus agree with the Seventh Circuit that "this component of section 623 (j) (1) is essentially meaningless at this juncture." Minch, 6363 F. 3d at 620 n.4. At present, a State or local government seeking to enforce a mandatory retirement provision must show only that: (1) the designated retirement age was set forth in a law that either was (a) in effect on March 3, 1983, or (b) in a law enacted after September 30, 1996, and is no lower than age fifty-five; and (2) the termination was taken pursuant to a bona fide retirement plan that is not a subterfuge for impermissible age discrimination. Having already addressed the timing and scope of law 181, we now consider appellants' contention

that the statute was a subterfuge to evade the purposes of the ADEA.[16]

C. The subterfuge Requirement

Plaintiffs argue that the enactment of Law 181 was a subterfuge to evade the requirements of the ADEA because the defendants "discriminated in a manner forbidden by the Act" when they lowered the mandatory retirement age from sixty-five to fifty-five. Plaintiffs emphasize that defendants acted with discriminatory animus, deliberately seeking to replace them with younger officers, and they assert that this

---

[16] Plaintiffs have failed to put in issue the bona fide nature of the retirement plan. In their Eight Amended Complaint, they alleged that the defendants did not act pursuant to a bona fide retirement plan, but, as the district court noted, "[t]hat lone assertion" is insufficient to state a viable ADEA claim. See Correa-Ruiz, 411 F. Supp. 2d at 50. Nor is it sufficient to preserve the issue for appeal. See B&T Masonry Constr. Co. v. Pub. Serv. Mut. Ins. Co., 382 F. 3d 36, 40 (1st Cir. 2004) ("To preserve a point for appeal, some developed argumentation must be put forward in the nisi prius court – and a veiled reference to a legal theory is not enough to satisfy this requirement."). Indeed, appellants have not attempted to develop the allegation on appeal.

An ADEA claim resting on that basis would, in any event, be unlikely to succeed in this case. See Kopec, 193 F. 3d at 901 ("Imbuing 'bona fide' with the meaning it carries in other, comparable provisions of the statute, a bona fide hiring plan presumably would be one that is genuine and pursuant to which actual hiring decisions are made." (citing Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158, 166 (1989), for the proposition that an "employee benefit plan is 'bona fide' to the extent that it... exists and pays benefits.... (citation omitted))).

discriminatory motive connotes an impermissible scheme to bypass defendants' obligations under the ADEA.

In effect, plaintiffs allege that Law 181 was a subterfuge to evade the ADEA because it was the product of intentional age discrimination. Using age as a basis for requiring retirement is precisely what section 623 (j) (2) entitles the Commonwealth to do, however, and we thus join the Second and Seventh Circuits in rejecting an interpretation of "subterfuge" that would effectively nullify the exemption. See Feldman, 434 F. 3d at 184 ("There is nothing deceptive about the state legislature doing exactly what Congress provided it the authority to do..."); Minch, 363 F. 3d at 629 ("[D]oing something that the statute expressly permits does not evade its prohibitions.").

In its analysis of the subterfuge limitation in Minch, the Seventh Circuit relied on the Supreme Court's decision in Public Employees Retirement System v. Betts, 492 U.S. 158 (1989). Minch, 363 F. 3d at 623-29; see also Feldman,

434 F. 3d at 184 (adopting the reasoning in Minch). The court in Betts had considered another provision of the ADEA – section 623 (f) (2) – that also contained a "subterfuge" exception to an exemption from liability. Minch, 363 F. 3d at 624. Section 623 (f) (2) protected age-based employment decisions from the prohibitions of the ADEA if they were taken pursuant to the terms of a bona fide benefit plan and if- in the same language that appears in section 623 (j) – the plan was "not a subterfuge to evade the purposes of" the Act. Id.

In interpreting the "not a subterfuge" language in section 623 (f), the Supreme Court rejected the notion that age-based differences in employee benefits would be inconsistent with the ADEA unless the employer could offer a cost justification for the differential treatment. Betts, 492 U.S. at 170-72. The court concluded that, to avoid "a self-defeating interpretation" of the exception, id. at 178, the "not a subterfuge" criterion could not invalidate the very age-

based line-drawing that the exemption allowed. Id. at 177-80; see also Minch, 363 F. 3d at 625. The Seventh Circuit applied that reasoning in the context of section623 (j):

> The ADEA does not forbid [a State or locality] from making age-based retirement decisions as to its police and firefighting personnel; it expressly allows state and local governments to make such decisions so long as they act within the parameters set forth in section 623 (j) (1) .... The statute does not condition the validity of such retirement programs on proof that the public employer has adopted the program genuinely believing that it is justified in the interest of public safety. Instead, recognizing that there was not yet any national consensus as to the relationship between age and one's fitness to serve as a police officer or firefighter, Congress opted simply to restore the status quo ante, permitting states and cities to continue imposing age limits on these positions as they had been able to do prior to the ADEA's extension to state and municipal employers and Wyoming's 1983 holding sustaining that extension.

Minch, 363 F. 3d at 629. Thus, proof that an employer imposes mandatory retirement for police officers and firefighters based on the view that "older individuals are not up to the rigors of law enforcement or firefighting and should make room for younger, 'fresher' replacements... will not establish subterfuge because it does not reveal a kind of discriminatory conduct that the ADEA by its very terms forbids." Id.

As both the Supreme Court in Betts and the Seventh Circuit in Minch emphasized, this understanding does not strip the "subterfuge" provision of all meaning. Instead, a plaintiff asserting subterfuge must show that "the employer is using the exemption as a way to evade another substantive provision of the act" – in other words, that the employer is "commit[ting] some other type of age discrimination forbidden by the ADEA." Minch, 363 F. 3d at 629-30; see also Betts, 492 U.S. at 180; Feldman, 434 F. 3d at 184. The

Seventh Circuit offered two examples of viable claims of subterfuge in the context of section 623 (j): (1) if an employer adopted or reinstated age limits in order to retaliate against an employee who had protested practices made unlawful by the ADEA, [17] or (2) if the employer adopted age limits for police and firefighting personnel at the same time that it created a new, lower-paying position unrestricted by age, and invited the newly retired officers to apply, allowing the inference that the mandatory retirement scheme was a subterfuge for wage discrimination against older employees. Minch, 363 F. 3d at 630 (citing Betts, 492 U.S. at 180).

As we have described, the plaintiffs here offer only accusations of age-based animus to support their subterfuge contention, alleging in their complaint that the governor and police superintendent agreed to "get rid... of a group of old

---

[17] Section 4 (d) of the ADEA, codified at 29 U.S.C. § 623 (d), forbids discrimination against an employee who has "opposed any practice made unlawful by" the Act or has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation" of an age discrimination complaint.

timers with the purpose of replacing them by younger officers." Even if that allegation fairly describes the defendants' motivation, the fact remains that the ADEA permits government employers who are concerned about the effectiveness of older public safety officers to impose mandatory retirement at age fifty-five. Plaintiffs have thus offered no theory of subterfuge that can withstand a motion to dismiss, and they have therefore failed to state a viable claim under the ADEA.

III.

Plaintiffs assert that their Fourteenth Amendment right to due process was violated when, pursuant to law 181, the defendants lowered the mandatory retirement age by en years without providing them an opportunity to demonstrate their physical and mental fitness to continue working. They claim that Law 447, the 1951 act that set sixty-five as the upper age limit for police officers, gave them a property interest in their jobs until they reached that age. Plaintiffs

also assert that they were entitled to individual hearings before their terminations.

We see no merit in this constitutional claim. To the extent plaintiffs have a property interest in their jobs, it derives from Commonwealth law. See Hatfield-Bermúdez v. Aldarondo-Rivera, 496 F. 3d 51, 59 (1st Cir. 2007) ("Property interest are ' created and... defined by existing rules or understandings that stem from an independent source such as state law.'" (quoting Bd. of Regents v. Roth, 408 564, 577 91972))). The "right" to continued employment until age sixty-five that plaintiffs claim to have been given by Law 447 was modified by Law 181, and no due process violation occurs when "the legislature which creates a statutory entitlement (or other property interest)... alter[s] or terminat[es] the entitlement by subsequent legislative enactment." Gattis v. Gravett, 806 F. 2d 778, 780 (8th Cir. 1986); see also id. at 781 ("While the legislative alteration or elimination of a previously conferred property

interest may be a 'deprivation,' the legislative process itself provides citizens with all of the 'process' they are' due.'" (citing Atkins v. Parker, 472 U.S. 115, 131 (1985)); Story v. Green, 978 F. 2d 60, 63 (2d Cir. 1992) ("Having enacted a statute that created such a [property] right, ... the legislature retains the power to enact new legislation altering or eliminating the right, and that elimination does not contravene the Due Process or Takings Clauses of the Constitution."); Hoffman v. City of Warwick, 909 F. 2d 608, 619-20 (1st Cir. 1990) ("Where the legislature enacts general legislation eliminating statutory rights or otherwise adjusting the benefits and burdens of economic life, in the absence of any substantive constitutional infirmity, 'the legislative determination provides all the process that is due.'" (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982)); see also Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. , 470 U.S. 451, 465-66 (1985) ("[A]bsent some clear indication that the legislature intends to bind itself

contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" (quoting Dodge v. Bd. of Educ., 302 U.S. 74-79 (1937))); Nat'l Educ. Ass'n-Rhode Island ex rel. Scigulinsky v. Retirement Bd. of R.I., 172 F. 3d 22, 27 (1st Cir. 1999).

Moreover, "[w]hen statutory benefits are denied or terminated pursuant to a class-wide policy determination, as opposed to an individual determination of eligibility, the Due Process Clause does not require the state to afford a hearing to each affected individual." Hoffman, 909 F. 2d at 620; see also Johnson v. Lefkowitz, 566 F. 2d 866, 869 (2d Cir. 1977) (rejecting entitlement to hearing before mandatory retirement because "the administrative cost to the state of providing each retiree with a hearing would be enormous, and by far outweigh the hardship to the individual"); cf. O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 800 (1980)

(Blackmun, J., concurring in the judgment) ("When governmental action affects more than a few individuals, concerns beyond economy, efficiency, and expedition tip the balance against finding that due process attaches."). Thus, the Police Department's failure to administer fitness tests before discharging plaintiffs violates neither the Constitution nor, as we have explained, the ADEA.

Plaintiffs also attempt to rest a due process claim on the arbitrariness" of age fifty-five as "the point at which Police Officers are no longer physically fit to serve on the force." They cite the Puerto Rico legislature's subsequent amendment of Law 181, by Act No. 22 of June 30, 2005 raising the upper age limit for police officers and firefighters to fifty-eight, as evidence that the defendants lacked a basis for terminating their employment at age fifty-five. Although this claim is insufficiently developed to warrant our consideration, it is, in any event, patently unavailing. Section 623 (j) explicitly permits States to impose mandatory

retirement on public safety personnel at age fifty-five, and a state legislature is therefore not obliged to amass scientific research or empirical evidence justifying its decision to adopt that age. The judgment made by Puerto Rico's legislature, after further reflection, that the Commonwealth's safety goals could be better achieved by raising the age to fifty-eight hardly demonstrates that the prior adoption of age fifty-five was arbitrary. "Forceful arguments certainly can be made as to the wisdom of enforcing a maximum age of hire, "Kopec, 193 F. 3d at 904, but Puerto Rico's decision to do so consistently with the ADEA did not violate plaintiffs' right to due process.

IV.

We summarize our holdings:

(1) Puerto Rico's Law 181, which lowered the mandatory retirement age for public safety personnel from sixty-five to fifty-five, is consistent with section 623 (j) of the ADEA;

(2) Defendants were not required to administer fitness tests before enforcing Law 181's mandatory retirement age because the testing requirement in section 623 (j) will not take effect until appropriate tests are identified in regulations promulgated by the Secretary of HHS;

(3) Plaintiffs' allegations of age-based animus on the part of defendants do not establish that Law 181 was a "subterfuge" for unlawful discrimination within the meaning of section 623 (j) (2) because the exemption's purpose is to allow the termination of police officers and firefighters on the basis on age;

(4) The Due Process Clause of the Fourteenth Amendment was not violated by plaintiffs' terminations without fitness testing or individualized hearings.

We thus conclude that the district court properly dismissed plaintiffs' complaint under Federal rule of Civil Procedure 12 (b) (6) for failure to state a viable claim for relief. The court likewise properly denied plaintiffs' motion for reconsideration.

The judgment of the district court is therefore affirmed.

So ordered.

CHRONOLOGY OF EVENTS LEADING TO AN EXEMPTION UNDER THE ADEA FOR THE MANDATORY RETIREMENT OF FIREFIGHTERS AND LAW ENFORCEMENT OFFICERS

1967
ADEA enacted. It does not apply to states and their political subdivisions, and existing mandatory retirement provisions for police officers and firefighters are unaffected.

1974
Congress extends the ADEA to cover government employers, meaning that public employers could retain maximum hiring and retirement provisions only if they could show that age was a bona fide occupational qualification for the jobs.

1976

U.S. Supreme court decision in National League of Cities v. Usery, 426 U.S. 833 (1976), raises doubts about whether the ADEA could constitutionally be applied to state and local governments.

1983

U.S. Supreme Court decision in EEOC v. Wyoming, 460 U.S. 226 (1983), upholds the extension of the ADEA to government employers. Mandatory retirement ages for firefighters and police officers were once again clearly unlawful unless the states and localities could show that age was a bona fide occupational qualification.

1986

Congress amends the ADEA to provide a temporary "safe-harbor" provision allowing the mandatory retirement of sate and local law enforcement officers and firefighters if the government employer had an age restriction in place on March 3, 1983 – the day after the ruling in EEOC v. Wyoming. No new mandatory retirement provisions could be adopted, and the exemption expired on December 31, 1993.

1996

Congress reinstated the safe-harbor provision, retroactive to December 31, 1993. The 1996 amendment also allowed public employers to adopt new mandatory retirement laws. Public employers could thus impose mandatory retirement on police officers and firefighters if: (1) the employer had a mandatory retirement law in effect as of March 3, 1983 and the age of retirement was set no lower than the age set in that earlier law; or (2) the employer enacted a new mandatory retirement provision with an age limit no lower than fifty-five.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 06-2578

CARMELO CORREA-RUIZ, FORMER COLONEL, ET AL.,

Plaintiffs, Appellants,

DANIEL GARCIA, ET AL.,
Movants,
v.
HONORABLE LUIS FORTUÑO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO, ET AL.,

Defendants, Appellees,

JUDGMENT

Entered: July 7, 2009

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

The appellants' June 9, 2009, motion requesting the case be decided expeditiously is denied as moot.

By the Court:

/s/Richard Cushing Donovan, Clerk

cc: Mr. Antonetti-Stutts, Mr. Gonzalez-Santiago, Ms. Rodriguez-Oronoz, Mr. Martinez-Luciano,
Ms. Hernandez-Santana, Mr. Del-Valle-Cruz, Mr. Penagaricano Brown & Mr. Hernandez-Sanchez,
Ms. Estades Boyer, Ms. Surillo & Ms. Negron-Vargas.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

FORMER CORONEL CARMELO CORREA RUIZ, ET AL.,	**CIVIL # 04-1775 (SEC)**
PLAINTIFFS	
VS.	
HONORABLE GOVERNESS OF PUERTO RICO MRS. SILA M. CALDERON, ET AL.,	
DEFENDANTS	

****

EIGHT AMENDED COMPLAINT

TO THE HONORABLE COURT:

Come now plaintiff through the undersigned counsel and very respectfully states and prays:

JURISDICTION

1. That the present case is being filed under the Age Discrimination In Employment Act (ADEA), section 1983 of 42 U.S.C. and its jurisdictional counterpart 28 U.S.C. 1331 & 1343; the 14th Amendment of the U.S. Constitution; 28 U.S.C. 2201 & 2202 (Declaratory Judgment); the case of Ex Parte Young 209 U.S. 123 (1908); supplemental jurisdiction (28

U.S.C. 1367) is requested under article 1802 of the Puerto Rico Civil Code and the case of Santini Rivera v. Serv. Air Inc., 94 JTS 121, which gives plaintiff's siblings and wives a cause of action for mental distress and sufferings in discrimination cases.

2. The governess of Puerto Rico and Mr. Cartagena Díaz and Mr. Rivera González are being sued in their personal and official capacity. The Government of the Commonwealth of Puerto Rico is sued under Ex-Parte Young for prospective relief.

3. The Legislature of Puerto Rico approved Statute No. 181 on August 15, 2003, reducing the age for mandatory retirement for the members of the police force and firefighters to 55 and 30 years of service, undermining therefore the protected rights under the provisions of the Age Discrimination in Employment Act which specifically prohibits age discrimination to employees between 40 and 70 years old. (29 U.S.C. §

623 (a)(1)) and in violation of the 14th amendment of the federal constitution. If the court finds that the Age Discrimination Act does not apply to a state because of what the U.S. Supreme Court decided in Daniel Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)[1], still plaintiffs have a cause of action against the officers of the Commonwealth of P.R. under 42 U.S.C. 1983 and Ex-Parte Young, supra.

PLAINTIFFS

4. The Police Officers herein included were involuntarily retired as per the above mentioned Statute from the Police Force of the Commonwealth of Puerto Rico. The families of each plaintiff are also requesting damages against defendants in their personal capacity as per article 1802 of the civil code of P.R. and invoke supplemental jurisdiction under 28 U.S.C. 1367. In the case of Santini Rivera v.

[1] This case decided that the ADEA purported abrogation of a state's sovereign immunity under article Xi is invalid.

Serv. Air Inc., 94 JTS 121, the Puerto Rico Supreme Court decided that the families of those who are discriminated in their employment can also request damages for mental distress and economic hardship. Plaintiffs are tenure employees of the Police Department of the Commonwealth of P.R. and there is a continuous violation of plaintiffs property rights as public employees. The termination of plaintiffs was done without due process in violation of the case of Cleveland Board of Education v. Loudermill, 470 U.S. 532 91985). Each police officer has a statutory cause of action under 42 U.S.C. 1983; against the governess and superintendent Agustín Cartagena Díaz in their personal and official capacity; a constitutional cause of action which derives from the 14th amendment and a prospective cause of action under the case of Ex-Parte Young[2], supra. The

[2] Ex-Pate Young decided that a suit challenging the constitutionality of a

following Police Officers and their families are Plaintiffs in the present case; FORMER CORONEL CARMELO CORREA RUIZ and his wife EVELYN ROY BONILLA and their siblings AILEEN MARIE CORREA ROY, JUAN CARLOS CORREA ROY, and JAVIER CORREA ROY; FORMER CORONEL WILFREDO PRATTS RODRIGUEZ and his wife ELBA I. RUIZ SANCHEZ and their siblings WILFREDO PRATTS RUIZ, ELIEZER PRATTS RUIZ, and ITZA PRATTS RUIZ; FORMER CAPTAIN MANUEL DE JESUS TORRES and his wife SONIA GIOVANNETTI ARANA and their siblings JENNIFER TORRES GIOVANNETTI and JANELLE TORRES GIOVANNETTI; FORMER INSPECTOR JUAN RIVERA CANCEL and his son

---

state officials actions in enforcing state law is not one against the state, see Ex-Parte Young, at page 159-160. Also, the case decided that a statute that is declare unconstitutional does not impact to the official any immunity from responsibility to the supreme authority of the U.S., at page 160.

JUAN RAUL RIVERA LATONI; FORMER INSPECTOR RAMIRO LOZADA SERRANO and his wife ROSA A. CONCEPCION ORTIZ; FORMER CAPTAIN WILLIAM MEDINA CRUZ; FORMER CORONEL O'NEILL GONZALEZ BERRIOS and his wife MAYRA I. CAMPOS BERMUDEZ, his siblings MIRIAM J. GONZALEZ FERNANDEZ, O'NEILL R. GONZALEZ MARTINEZ, JENNIFER J. GONZALEZ CAMPOS and O'NEILL E. GONZALEZ CAMPOS; FORMER CORONEL CESAR GRACIA ORTIZ and his wife NAYDA GALIANO RODRIGUEZ and their siblings ELVIS N. GRACIA GALIANO, ERICK N. GRACIA GALIANO, and EDGAR N. GRACIA GALIANO; FORMER CORONEL ARTURO COLON RODRIGUEZ and his wife ANTONIA RODRIGUEZ RIVERA and their daughter MAYRA COLON RODRIGUEZ; FORMER COMMANDER

ABIMAEL RODRIGUEZ RIVERA and his wife BETSY TORRES RIVERA and their siblings LAURA RODRIGUEZ TORRES, IVELISSE RODRIGUEZ TORRES and another daughter JANE DOE; FORMER LT. CORONEL JORGE RIVERA CORREA; FORMER LT. CORONEL GILBERTO DIAZ PAGAN and his wife MARIA ENID CRUZ SANTIAGO and their daughter GILENY MARY DIAZ CRUZ; FORMER LT. HECTOR FIGUEROA SOTO and his wife ARCADIA MOLINA OJEDA; FORMER LT. CARMELO FERNANDEZ SOLANO and his wife MINERVA PAGAN BERRIOS; FORMER COMMANDANT JUAN ESPADA RODRIGUEZ and his wife SYLVIA REYES SANTEN. The minor that are included in this complaint are represented by the officers which appear as Plaintiffs in the present case; FORMER SGT. FEDERICO TOSADO GUZMAN and his wife

LILLIAN RIVERA MOLINA; FORMER AGENT CARMELO NAZARIO LOPEZ and his wife JOSEFINA ALVAREZ ALVERIO; FORMER 2ND LT. BERNARDINO CARCAÑO LLANO and his wife SARA FELICIANO GONZALEZ; FORMER CAPTAIN ANGEL LUIS CANDELAS and his wife LUZ IAIDA TORRES RIVERA; FORMER SGT. LUIS SANCHEZ SANCHEZ and his wife LUZ AYALA CENTENO; FORMER COMMANDER WILLIAM MIRO ZAYAS and his wife HILDA GARCIA FLORES; 1st FORMER LT. WILFREOD MORALES PASTRANA and his wife MARIA VAZQUEZ ALICEA; FORMER LT.JOSE GONZALEZ RODRIGUEZ and his wife MARIA ORTIZ OTERO; FORMER INSPECTOR PELEGRIN ORTIZ ORTIZ and his wife DIANA CARTAGENA ORTIZ; FORMER CAPTAIN SIGFREDY GONZALEZ MENDEZ and his wife

LUZ LASALLE MENDEZ; FORMER CAPTAIN EUGENIO MONTES SOTO and his wife EMMA DE LEON ALVAREZ. THE COMMUNITY SOCIETY (SOCIEDAD LEGAL DE GANANCIALES) FORM BETWEEN EACH PLAINTIFF AND HIS WIFE; FORMER CAPTAIN JOSE MARRERO PIZARRO and his wife AURIA CANCEL RAMOS; FORMER SERGEANT CARMELO CRUZ RODRIGUEZ and his wife VIRGINIA VAZQUEZ MARTINEZ. The community society between each police officer and his wife has suffered damages which amounts to the reduction of income which fluctuate between a $1,000.00 and $2,000.00 more less. Also, the commonwealth of Puerto Rico owe to some of the plaintiffs compensatory hours accrued during the time of their public service which fluctuates between

$5,,000.00 to $10,000.00, money that is requested from defendants.

5. Most of the plaintiff's who were involuntarily retired filed an administrative complaint with the federal agency known as the Equal Employment Opportunity Commission (EEOC) within the time provided by law after their dismissals from the police force and such federal agency issued a right to sue letter granting to the plaintiffs that filed the complaint 90 days since the date of such letter to file suit. Plaintiffs are filing this suit within the 90 day time limit allowed to them and/or within the one year statute of limitation under 42 U.S.C. 1983. Those plaintiffs that did not file the complaint, nevertheless have a cause of action under 42 U.S.C. 1983 for the violation of their equal protection clause under the 14th amendment of the U.S. Constitution.

DEFENDANTS

6. Defendants that are responsible to plaintiff in their personal and official capacity are Hon. Governess of Puerto Rico Mrs. Sila M. Calderon and the Super-intendant of the Police Corps of Puerto Rico Agustín Cartagena and former Super-intendant Víctor M. Rivera González. The Commonwealth of Puerto Rico, is sued under Ex-Parte Young, supra for prospective relief which is an exception to amendment XI of the U.S. Constitution. It is alleged against the Commonwealth of P.R. that law 181 above mentioned is unconstitutional.

7. Defendant, governess Sila M. Calderon as Commander in Chief of the Puerto Rico Police Department and as the highest authority for the government of Puerto Rico reponds personally and in her official capacity to Plaintiffs for signing a law that clearly discriminates against police officers and firefighters solely on the basis of their age.

Specifically it is aver that the governess of P.R. and former superintendent Rivera González agreed between both to get rid within the police force of P.R. of a group of old timers with the purpose of replacing them by younger officers.

8. Present Super-intendant of the Puerto Rico Police Department Agustín Cartagena and former Super-intendant Víctor M. Rivera González respond, both in their personal and official capacity, for implementing a law that has discriminatory effects on the members of the police force who turn 55 years old and have 30 years of service by retiring them against their will.
9. Statute no. 181 approved on August 15, 2003 is unconstitutional on its face an/or in its application for it violates the equal protection clause of the 14th Amendment.
10. Defendants arbitrarily set up age 55 as the point at which Police Officers are no longer physically fit to

serve on the force and did not rely on scientific research or empirical data to reach their conclusions. Gately v. Commonwealth of Massachusetts, 2 F. 3rd 1221 (1993).

11. Defendants did not demonstrate that all or substantially all individuals involuntarily retired are in fact disqualified to perform their job effectively. Western Airlines v. Criswell, 472 U.S. 400 (1985).

12. The ADEA Act apply with special force in the case of mandatory retirement provisions and it preempts any Puerto Rico Statute. See EEOC v. Wyoming, 460 U.S. 226 (1983).

13. Statute 181 violates on its face the ADEA provision that no employer may "discharge any individual or otherwise discriminate against any individual... because of that individual's age, 29 U.S.C. § 623 (a)(1). Also, it violates the equal protection clause of

the 14th amendment because law no. 181 creates an impermissible classification base on age.

14. Defendants did not demonstrate in this particular case that age (55 years old) is a bona fide occupational qualification reasonably necessary to the normal operation of the Puerto Rico Police Force (29 U.S.C. § 623 (f)(1)), Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985), specially taking into account the obvious contradiction of the Statute seeing that Puerto Rico Police Personnel Regulation in its article 12.2 (3) establishes the minimum age for entry at 18 and the maximum is at 39, therefore having the potential situation of a police officer retiring at age 69, fourteen (14) years past the mandatory retiring age of 55 when combined with 30 years of service.

15. Defendants did no act pursuant to a bona fide retirement plan and instead used Statute 181 as a subterfuge to evade the purposes of the ADEA

provision. 29 U.S.C. § 623 (j) and the equal protection clause of the 14th amendment.

16. Plaintiffs have a cause of action against the Commonwealth of Puerto Rico under Ex-Parte Young because of continuous violation of plaintiffs equal protection clause of the 14th amendment and because of the Commonwealth continuous efforts to apply to plaintiffs an illegal and unconstitutional statute like law 181 of August 15 of 2003. See Green, et al., v. Mansour, Director, Michigan Department of Social Services 474 U.S. 64 (1985). This case decided that when there is a continuing violation of Federal Law remedies are necessary to end such violation in order to vindicate the federal interest in assuring the supremacy of that law.

17. Plaintiffs have also a cause of action against the state officers of the caption in their personal and official

capacity under Ex-parte Young and under the 14th amendment

18. The state officers of the caption knew or should have known that the law no. 181 was unconstitutional and was implemented with a discriminatory animus against plaintiffs. Hon. Governess of P.R. Sila Calderon and former Superintendent of the Police of P.R. Mr. Victor Rivera Gonzalez, met together and planned together the termination of plaintiff from their career jobs to replace them by younger police employees in violation of the equal protection clause of the 14th amendment. Therefore, they are not entitled to qualify immunity. See Harlow v. Fitz Gerald 457 U.S. 800.

19. That there is a need for a factual hearing before the court entertains any Motion To Dismiss or any motion For Summary Judgment to determine what

scientific or medical criteria was used by defendants to apply to plaintiff law #181 of August 15 of 2003.

DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY JUDMENT

20. Each one of the police officers which appear as plaintiff in the above caption case suffered an emotional trauma because of their involuntary termination form the police service and are suffering economic loss of about $1,000.00 a month due to defendants actions.

21. Each one of the Police Officers that appear as Plaintiffs in the present action request TEN MILLIONS DOLLARS in compensatory damages and TEN MILLIONS DOLLARS in punitive damages for a total amount of **FIVE HUNDRED AND EIGHTY MILLIONS DOLLARS.**

22. The wife's and siblings herein included in the complaint of each plaintiff, suffered and are suffering

mental distress and economic hardship because of the involuntary termination from the police force of each plaintiff

23. That after the complaint was filed, new facts have taken place which are related to the issues and controversies described in the present complaint. Such facts are as follows:

    a. the former governess of Puerto Rico and the former superintendent of the Police Force of Puerto Rico agreed before last November election to recruit police officers that were terminated from their jobs when they reached 55 years of age.

    b. That the former superintendent went ahead and recruited police officers which had reached the age of 55 and were terminated from service.

c. That the new superintendent of the police of Puerto Rico, Mr. Toledo, has stated publicly that law 181 will be amended to increase the age of termination from 55 up. Also, the new governor of Puerto Rico has joined Mr. Toledo's expressions and a bill will be filed in the legislature of Puerto Rico to that effect.

WHEREFORE, it is respectfully requested from this Honorable Court to:

1. Enjoin the state officers sued herein from discriminating against Plaintiffs solely based on their age.
2. Declare Statute 181 unconstitutional on its face and or in its application because it violates the equal protection clause of the 14th Amendment and enjoin the Commonwealth of P.R. from applying prospectively Law no. 181 under the Ex-parte Young case once it is declare unconstitutional.

3. Declare that the mandatory retirement of Police Officers in the present case constitutes a violation of the Equal Protection Clause of the 14th amendment.
4. Order Defendants in their individual capacity to pay each police officer suing herein 10 Million Dollars for compensatory damages and 10 Million Dollars for punitive damages for a total of Four Hundred and Twenty Millions Dollars.
5. Order Defendants to pay $50,000.00 to each member of the Plaintiff's families, including each plaintiffs police officers's wife for mental distress and economic hardship as a consequence of the discriminatory dismissal against police officers.
6. Award Plaintiffs their costs and reasonable attorneys fees.
7. Issue such order and further relief this Court shall find to be just and proper including reinstatement of plaintiffs to their jobs.

8. Order defendants to pay each plaintiff the compensatory hours owe to each one which fluctuates between $5,000.00to $10,000.00.

9. Declare that plaintiffs were tenured employees and had a property right in their jobs and were entitled before their termination, to due process under the 14th amendment under the case of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this January 14, 2004.

HERNANDEZ SANCHEZ LAW FIRM
1519 PONCE DE LEON AVE.
FIRST BANK BLDG., SUITE 806
SANTURCE, PR 00909-1791
TEL (787) 722-5813/5814
FAX (787) 725-1112
E-mail hersanlaw@prtc.net

s/Jesus Hernandez Sanchez
JESUS HERNANDEZ SANCHEZ
BAR NO. 109208

s/Ariel Hernandez Santana
ARIEL HERNANDEZ SANTANA
BAR NO. 221107

APPENDIX D

CERTIFIED TRANSLATION

ACT No. 181 of the year 2003

(H.B. 2037), 2003, Act 181

To amend Act. No. 447 of 1951; Government Personnel Retirement Act
Act no. 181 of August 15, 2003

To amend Act No. 447 of May 15, 1951, as amended, known as the "Government Personnel Retirement Act" in order to intercalate an Article 7 to make it mandatory for the members of the Puerto Rico Police and the Fire Fighters Corp to retire at fifty-five (55) years of age and thirty (30) years of service credited in the Retirement System. In the case of the Puerto Rico Police, the Superintendent may authorize a member of the force to comply an additional term and up to a maximum of twenty-four (24) months and in Police Reserve duties.

PREAMBLE

Starting the new millennium the demands of safety and work conditions make necessary a re-evaluation of the Puerto Rico Police and the Firefighters Corps in order to give a better security to the people. It

is necessary modernize its goals, philosophy and methods and to insert innovating working strategies. This comprehensive change includes the need of new security and protection systems opened to new commanders and to different persons who would complement and make the needs of innovation a reality.

In order to make this renovation come through we have to start by opening spaces to new persons who would contribute their knowledge and eventually would take over the management of these security corps. A good option to promote this unpostponable is to establish a maximum of years of services for police officers and firefighters maintaining a periodic renewal of these corps which would allow compliance with the present needs and at the same time would provide to so outstanding employees the opportunity-mandate to retire

and enjoy along with their dear ones the rest of their lives.

With this legislative piece, no discrimination is being applied to the members of the Police or Firefighters Corps for reason of age. Likewise, this initiative complies with Public Act 90-202 of December 15, 1967, as amended, known as "Age discrimination in Employment Act" (ADEA), since with this legislation an employee is not force to retire motivated only by age. To establish an age requirement for a police officer or firefighter is reasonably linked to the specific job tasks or duties they perform. It is necessary to mention that the Legislative Assembly has the responsibility of guaranteeing that the police officers and firefighters are properly performing their tasks for their own security and that of the society they protect.

The Supreme Court of the United States of America in the cases of Pokins v. Zage; E.E.O.C. and in Missouri State highway Patrol v. Borough of Manheim specifically validated the mandatory retirement system for police officers. Likewise it was found that the age responded to a fundamental need of work performed by the officers such as patrolling. Further, it was stated in the Polins v. Zage case that the conclusion is not affected at all by the fact that at the time the official retirement was required the impeaching officer was performing sedentary duties, since all members of the force affected by the rule were required to render the same duties. No member would only perform administrative duties and at any time all of them have to go back to the duties of the position.

The Legislative Assembly restitutes, with modification, the concept of the mandatory retirement in

the Police and Firefighter Corps attending to the compelling needs that demand a dynamism in the Puerto Rico Police and in the Firefighting Corp. In order to comply with the public policy of the state to give a higher security to the people and to protect the security of the members of such honorable organizations.

BE IT DECREED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

Section 1. – Act No. 447 of May 15, 1951, as amended, known as the Government Personnel Retirement Act is hereby amended in order to intercalate a new Article 7, to read as follows:

Article 7. – Retirement shall be mandatory for members of the Puerto Rico Police and the Firefighters Corps after having reached the age of fifty-five (55) and having thirty (30) years of services credited at the Retirement System. In the case of the Police Force, the

Superintendent may authorize a member of the force to comply with an additional term and up to a maximum of twenty-four (24) months and working at the Police Reserve. Said application for additional term shall be file not later than ninety (90) days before the due date of retirement.

Section 2.- This Act shall become effective as of July 1, 2003.

APPENDIX E

CERTIFIED TRANSLATION

ACT No. 22 of the year 2005

(H.B. 235), 2005, Act 22

To amend Article 2 – 104a of Act. No. 447 of May 1951: Government Personnel Retirement Act

To amend Article 2-104z of Act No. 447 of May 15, 1951, as amended, known as the Government Personnel Retirement Act, in order to set the age for mandatory retirement of the members of the Puerto Rico Police and the Firefighters Corps at fifty-eight (58) years of age and other related matters.

PREMBLE

The debate on the age until which it is desirable to maintain members of the Puerto Rico Police and Firefighter Corp active is not new. In 1967, the Congress of the United States of America approved the Age Discrimination in Employment Act, better known as ADEA, 29 USC § 621 et seq., to forbid the taking

decisions in the employment using age as criteria. At that time, ADEA applied only to private employers and the federal government; not to state or local governments. However, in 1974 the application of the ADEA was extended to cover those governments through the approval of an amendment to that effect. Its application on state and local governments was acknowledged in 1983 by the Supreme Court of the United States of America in Equal Employment Commission v. Wyoming 460 U.S. 226, 103 S. Ct. 1054, 75 L.Ed.2d 18 (1983).

Before the application of the ADEA at the state and municipal level, many Police and firefighters departments required a mandatory retirement at certain age, including the City of Chicago, which wanted a retirement by age 63. The provisions of ADEA forbid the discrimination based on the age criteria against an

employee, unless in circumstances where the age would be a bona fide occupational requirement reasonably necessary for the operation or management of a particular area or where the difference is based on other reasonable elements, in addition to the age. The decision in the EEOC v. Wyoming case, supra, defy the restrictions for reason of age of the police and firefighter department, resulting in the elimination of state and municipal public policies on mandatory retirement. Congress of the United States, in order to respond to the concerns of local and state governments, amended ADEA in 1986, in order to add to the statute an exception which exempts the application of the banning on members of the local Police and Firefighters Departments. That is, as of the date of effectiveness of the 1986 amendment, the mandatory retirements could be reinstated at a certain age for these employees. The

amendment, in its origin was of a temporary character, then in 1996 it became permanent. Recently in Smith v. city of Jackson case, 125 S Ct. 1536 (decided in 2005), the Supreme Court reiterated that the intention of Congress of including the amendments on ADEA, was consistent with the fact that age, different from race or other classification, has no relevance as to the capacity of the individual of performing certain duties. The Supreme Court, in turn reiterates that the determinations made by the police and firefighters departments on its officers, have to be based on elements other than age, thus complying with the legitimate goals of retaining able official personnel to perform its duties.

In the case of Puerto Rico, with the approval of Act No. 181 of August 15, 2003, the age for mandatory retirement was established at fifty-five (55) years of age and thirty (30) years of credited service.

In this Act, the age for retirement is increased to fifty-eight (58) years of age. The reason for this is simple: Puerto Rico needs its experience members of the Police and Firefighters department to continue in their positions for an additional period of time to assist in directing the security and law and order officers who have less time in service.

BE IT DECREED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

Article 1. – Article 2.104a of Act. No. 447 of May 15, 1951, as amended, is hereby amended to read as follows:

Article 2-104a, - Mandatory retirement for police officers and firefighters.

The members of the Puerto Rico Police and the Firefighters Corps, may go into voluntary retirement after having reached the age of fifty-five and thirty (30)

years of service. Retirement shall be mandatory as of the date in which the participant reaches thirty (30) years of services and fifty-eight (58) years of age.

Article 2. – This Act shall become effective immediately after its enactment.

APPENDIX F

No.

IN THE SUPREME COURT OF THE UNITED STATES

ADDENDUM A : LIST OF PARTIES

CARMELO CORREA-RUIZ, Former Colonel EVELYN ROY-BONILLA, wife of Former Colonel Carmelo Correa-Ruiz; AILEEN MARIE CORREA-ROY; JUAN CARLOS CORREA-ROY, JAVIER CORREA-ROY; **WILFREDO PRATTS-RODRIGUEZ**, Former Colonel; ELBA I. RUIZ-SANCHEZ, wife of Former Colonel Wilfredo Prats-Rodriguez; WILFREDO PRATTS-RUIZ; ELIEZER PRATTS-RUIZ; ITZA PRATTS-RUIZ; **MANUEL DE JESUS-TORRES**, Former Captain; SONIA GIOVANNETTI-ARANA, wife of Former Captain Manuel De Jesus-Torres; JENNIFER TORRES-GIOVANNETTI; JANELLE TORRES-GIOVANNETTI; **JUAN RIVERA-CANCEL**, Former Inspector; JUAN RAUL RIVERA-LATONI; **RAMIRO LOZADA-SERRANO**, Former Inspector; ROSA A. CONCEPCION-ORTIZ, wife of Former Inspector Ramiro Lozada-Serrano; **WILLIAM MEDINA-CRUZ**, Former Captain; **O'NEILL GONZALEZ-BERRIOS**, Former Colonel; MAYRA I. CAMPOS-BERMUDEZ, wife of Former Colonel O'Neill Gonzalez-Berrios; MIRIAM J. GONZALEZ-FERNANDEZ; O'NEILL R. GONZALEZ-MARTINEZ; JENNIFER J. GONZALEZ-CAMPOS; O'NEILL E. GONZALEZ-CAMPOS; **CESAR GRACIA-ORTIZ**, Former Colonel; NAYDA

GALIANO-RODRIGUEZ, wife of Former colonel Cesar Gracia-Ortiz; ELVIS N. GRACIA-GALIANO; ERICK N. GRACIA-GALIANO; EDGAR N. GRACIA-GALIANO; **ARTURO COLON-RODRIGUEZ,** Former Colonel; ANTONIA RODRIGUEZ-RIVERA, wife of Former Colonel Arturo Colon-Rodriguez; MAYRA COLON-RODRIGUEZ; **ABIMAEL RODRIGUEZ-RIVERA,** Former Commander; BETSY TORRES-RIVERA, wife of Former Commander Abimael Rodriguez-Rivera; LAURA RODRIGUEZ-ORTIZ; IVELISSE RODRIGUEZ-ORTIZ; SHEILA RODRIGUEZ-TORRES; SHARI PEREZ-TORRES; ABIGAIL RODRIGUEZ-TORRES; **JORGE RIVERA-CORREA**, Former Lt. Colonel; **GILBERTO DIAZ-PAGAN**, Former Lt. Colonel; MARIA ENID CRUZ-SANTIAGO, wife of Former Lt. Colonel Gilberto Diaz-Pagan; GILENY MARY DIAZ-CRUZ; **HECTOR FIGUEROA-SOTO**, Former Lieutenant; ARCADIA MOLINA-OJEDA, wife of Former Lieutenant Hector Figueroa-Soto; **CARMELO FERNANDEZ-SOLANO**, Former Lieutenant; MINERVA PAGAN-BERRIOS, wife of Former Lieutenant Carmelo Fernandez-Solano; **JUAN ESPADA-RODRIGUEZ**, Former Commander; SYLVIA REYES-SANTEN, wife of Former Commander Juan Espada-Rodriguez; **THE COMMUNITY SOCIETY; HECTOR L. LAUREANO-RIVERA**, Former Colonel; NILDA MORALES-ROSADO, wife of Former Colonel Hector L. Laureano-Rivera; **BERNARDINO CARCANO-LLANO**, former 2nd Lieutenant; SARA FELICIANO-GONZALEZ, wife of Former 2nd Lieutenant Bernardino Carcano Llano; **CARMELO NAZARIO-**

LOPEZ, Former Agent; JOSEFINA ALVAREZ-ALVERIO, wife of Former Agent Carmelo Nazario-Lopez; **FEDERICO TOSADO-GUZMAN**, Former Sergeant; LILLIAM RIVERA-MOLINA, wife of Former Sergeant Federico Tosado-Guzman; **LUIS SANCHEZO-SANCHEZ**, Former Sergeant; LUZ I. AYALA-CENTENO, wife of Former Sergeant Luis Sanchez-Sanchez; **ANGEL L. CANDELAS**, Former Captain; LUZ IRAIDA TORRES-RIVERA, wife of Former Captain Angel L. Candelas; **PELEGRIN ORTIZ-ORTIZ**, Former Inspector; DIANA CARTAGENA-ORTIZ, wife of Former inspector Pelegrin Ortiz-Ortiz; **JOSE GONZALEZ-RODRIGUEZ**, Former Lieutenant; MARIA ORTIZ-OTERO, Wife of Former Lieutenant Jose Gonzalez-Rodriguez; **WILFREDO MORALES-PASTRANA,** Former 1st Lieutenant; MARIA VAZQUEZ-ALICEA, wife of Former 1st Lieutenant Wilfredo Morales-Pastrana; **WILLIAM MIRO-ZAYAS**, Former Commander; HILDA GARCIA-FLORES, wife of Former Commander William Miro-Zayas; **SIGFREDY GONZALEZ-MENDEZ**, Former Captain; LUZ LASALLE-MENDEZ, wife of Former Captain Sigfredy Gonzalez-Mendez; **CONJUGAL PARTNERSHIP GONZALEZ-LASALLE; EUGENIO MONTES-SOTO**, Former Captain; EMMA DE LEON-ALVAREZ, wife of Former Captain Eugenio Montes-Soto; **CARMELO CRUZ-RODRIGUEZ**, Former Sergeant; VIRGINIA VAZQUEZ-MARTINEZ, wife of Former Sergeant Carmelo Cruz-Rodriguez; **JOSE MARRERO-PIZARRO**, Former Captain; AURIA CANCEL-RAMOS, wife of Former Captain Jose Marrero-Pizarro

Petitioners

v.

HONORABLE LUIS FORTUÑO, in his official capacity as Governor of the Commonwealth of Puerto Rico; **HONORABLE SILA M. CALDERON-SERRA**, in her personal capacity; **VICTOR M. RIVERA GONZALEZ,** Former Superintendent of the Police Corps Department of Puerto Rico, in his personal capacity; **THE POLICE DEPARTMENT OF THE COMMONWEALTH OF PUERTO RICO and the COMMONWEALTH OF PUERTO RICO; JOSE FIGUEROA SANCHA,** Superintendent of the Police Department of Puerto Rico, in his official capacity.

Respondents